WEST REGIONAL EQUITY NETWORK

THE OUTER LIMITS:
Disciplining Students without Getting Sued

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Disciplining students in public schools has never been easy. Teachers and school administrators must decide what discipline is appropriate under the circumstances, while making sure they honor students' rights to due process. They frequently make these decisions under pressure while dealing with a multitude of other issues and while they sometimes make mistakes, American educators have done a remarkably good job of balancing discipline concerns and legal concerns.

The Issue of Jurisdiction: Discipline and Off-Campus Misbehavior

One of those legal concerns is jurisdiction. Historically, educators have understood that their ability to discipline students for misbehavior is limited to situations where students are at school, participating in school activities, or going to and coming from school. When a student misbehaves in class it is an issue for the teacher and administrator. When a student misbehaves at home, that is an issue for the child's parents or guardians. That is where the jurisdictional line is easy to draw.

It's not so easy when the misbehavior occurs neither in school nor in the home. In one example, a high school student saw one of his teachers in a restaurant parking lot and gave him the "finger." The student was disciplined by the school and his parents challenged the discipline by arguing that the school had no jurisdiction over an event that took place away from school, was not in a school-sponsored activity, and was not under school control. The judge castigated the student, calling him a "splenetic, bad-mannered little boy." Then he ruled in the bad-mannered little boy's favor.[1] The school had argued that the incident would have an impact on the school and make it more difficult to impose discipline and control student behavior, but the judge was not persuaded. In legal terms, the judge did not believe the parking lot incident would cause "substantial disruption" of the educational process. As understandable as it might be, teacher or administrator anger over a vulgar gesture or similar off-campus behavior does not satisfy the legal "substantial disruption" test.[2]

The New Challenges of Cyber-Space and the Internet

A restaurant parking lot is one thing. Cyber-space, the faceless and unlimited "parking lot" of modern communications is quite another. As the World Wide Web and traditional communication technologies blend together in a ubiquitous network with global reach, verbal and graphic slings and arrows can come from anywhere at any time. For example, a student could take a compromising photo of another individual on a cell phone, share

the photo with other students through email, and post it on an interactive Web site for the entire world to behold. The lonely computer now interfaces with many other kinds of devices. "In terms of hardware, the technologies include computers and various personal digital devices, including cell phones, MP3s, and personal digital assistants (PDAs), such as Palms and Blackberrys.[3]

Students use these devices to send email and instant messages, join each other in chat rooms, participate in discussion boards and e-mail mailing lists, and exchange text messages. Many students have blogs, "a merger between Web sites and discussion boards."[4]

The creativity employed by students in their pursuit of cyber-mischief has spawned a new vocabulary: flaming, harassment, denigration, impersonation, outing, trickery, exclusion, cyberstalking, and cyberthreats.[5] All these behaviors could subject students to discipline.

Teachers and school administrators need to understand these technologies and their potential for mischief and injury. At the same time, however, they need to be mindful of the delicate balance between the need to impose discipline and the need to honor and protect students' rights under the Constitution. Recent court cases demonstrate how well-meaning teachers and administrators unwittingly invite lawsuits by violating the First and Fourth Amendment rights of the students they discipline for cyber-mischief.

Cell Phones and School Discipline: A Case Study in What to Do Wrong

In a case out of Pennsylvania, a student was disciplined when a cell phone fell out of his pocket during class. That violated a school district policy and the teacher promptly confiscated the phone. So far, so good. Then they went too far:

> Ms. Kocher confiscated Christopher's cell phone because he displayed it during school hours, in violation of a school policy prohibiting the use or display of a cell phone during school. Subsequently Ms. Kocher and Assistant Principal Grube called nine other students listed in Christopher's phone number directory to determine whether they, too, were violating the school's cell phone policy.
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> The assistant principal and teacher also accessed Christopher's text messages and voice mail. They also held a conversation with Christopher's younger brother by using the cell phone's America Online Instant Messaging feature, without identifying themselves as being anyone other than Christopher.[6]

The student and his parents filed a 10 count complaint against the school district, the teacher, and two administrators. The defendants asked the Court to dismiss all 10 counts. The judge refused to dismiss most of the counts, including an allegation that the defendants violated the student's Fourth Amendment right against unreasonable search and seizure.[7] The perfectly lawful and reasonable policy against the use and display of cell phones did not open the door to the subsequent actions by the teacher and

administrators. The United States Supreme Court has ruled that "The Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials and is not limited to searches carried out by law enforcement officers. Nor are school officials exempt from the Amendment's dictates by virtue of the special nature of their authority over schoolchildren."[8]

Inappropriate Websites: The Spawning Ground of Lawsuits

As troublesome as issues arising from misuse of cell phones and other communication devices can be, Web sites present the greatest challenge and danger to educators. The Internet, with more than a billion participants,[9] is the biggest "parking lot" of all. Bad-mannered little boys – and girls – are posting all kinds of mischief on the Internet and anybody with an Internet connection can see it. Other students, teachers, and administrators can view their websites. And quite often, when teachers and administrators view the sites, they discipline the students who post the material. They know instinctively that school discipline and the learning environment suffer when students openly insult teachers and administrators, and they act on their instincts.

Unfortunately for the educators, their understandable instinctive reaction frequently leads them into court and a judge who is looking for "substantial disruption." When the court does not find such disruption, it rules against the educators and the school district is ordered to vacate the discipline, purge the discipline from the student's educational records, pay the student's legal fees and sometimes pay monetary damages to the student. Recently, a school district that disciplined a student over a web site that included hostile "rap" lyrics paid the student and his parents $90,000 in a voluntary settlement.[10]

In the Internet mischief cases, one reason schools and school districts wind up paying monetary damages is that the court ruled that they violated the students' constitutional right of free expression under the First Amendment. A denial of First Amendment rights is, by definition, irreparable injury.[11] The courts protect the rights of Americans to exercise their right of free expression, and that right extends to bad-mannered children who create web pages away from school, on their own time, in their own homes. Unless those web pages cause a substantial disruption of the educational environment, the courts have consistently ruled that they are protected by the First Amendment. And, as noted, the fact that they anger or annoy teachers and administrators is not "substantial disruption" in the eyes of the law.

What Is "Substantial Disruption?" There Is No Clear Answer

Unfortunately, the courts have not been clear about what constitutes "substantial disruption." One court found substantial disruption when a teacher who was attacked in a vicious web site was so distraught that she suffered mental and emotional trauma and took a leave of absence. The school had to hire a substitute and the court ruled that satisfied the test.[12] In another case, the school said it had to disable its computer network while computer engineers worked to block the offending web site. The court in that case initially determined there was "substantial disruption" within the meaning of the law when it denied the student's request for a preliminary injunction against the school

discipline.[13] However, the Court reversed itself following a hearing on cross-motions for summary judgment, finding there was not substantial disruption under the circumstances. Furthermore, the Court ruled in the student's favor, holding that the district had violated the student's First Amendment rights, and ordered a jury trial to determine monetary damages.[14]

That does not necessarily mean that a school district must place a distraught teacher on a leave of absence or shut down its computer network in order to discipline a student for off-campus cyber-mischief without losing a lawsuit. Courts have not set out a clear test of what constitutes "substantial disruption" in the context of cyber-mischief and the Supreme Court of the United States has never addressed the jurisdictional issue.

The Arkansas legislature passed, and the Governor signed, a bill that attempts to define "substantial disruption." This is the language of the legislation:

> "Substantial disruption" means without limitation that any one or more of the following occur as a result of the bullying:
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> (i) Necessary cessation of instruction or educational activities;
> (ii) Inability of students or educational staff to focus on learning or function as an educational unit because of a hostile environment;
> (iii) Severe or repetitive disciplinary measures are needed in the classroom or during educational activities; or
> (iv) Exhibition of other behavior by students or educational staff that substantially interfere with the learning environment.[15]

While this is not a panacea, it is an admirable attempt to quantify and define what "substantial disruption" means in the context of cyber-bullying and cyber-threats. Of course, as with all legislation, its constitutionality and impact may not be known until students are disciplined for causing substantial disruption within the meaning of this law and the courts are called upon to either validate the law or find it unconstitutional for vagueness or overbreadth.

That brings us back to the immediate question. What do educators do now? How can they avoid litigation over off-campus cyber-mischief while taking effective steps to discourage it? A few suggestions follow.

Seven Strategies for Educators

Alternatives to Disciplinary Action That Can Help Teachers, Administrators and School District Governing Boards Avoid Being Taken To Court

1. Tell the parents. Notifying parents and guardians is always an element of the discipline process, but it frequently is adjunct to the disciplinary proceeding itself. Parental notification usually means letting parents know that their child faces

punishment for a disciplinary infraction. However, educators must remember that parental notification can be enough by itself, especially if the misbehavior occurs off-campus. Educators are sometimes too eager to trump the parental role when off-campus cyber-mischief offends, angers, or annoys school personnel. One of the strategies educators can use when a student creates an offensive web page is to call upon the parents to exercise their parental authority. Parental notification is not "discipline" in the sense that suspensions, expulsions, and referral to alternative educational settings are. The lawsuits that have been filed against school administrators who allegedly overstep their jurisdiction result from measures such as these. If school administrators notify the parents that their child is engaging in cyber-mischief off-campus – which usually means at home – most parents will deal with the situation without feeling defensive. When school administrators try to discipline students for behavior that takes place in the home, parents tend to be resentful and defensive. Resentful and defensive parents are likely to contact their lawyers.

2. Try to avoid changes of placement. This is an important aspect of the "tell the parents" strategy. "Changes of placement" include alternative placements, suspensions, or expulsions. Those kinds of changes trigger due process requirements, sometimes including a hearing. The wisest course for educators oftentimes is to limit or forego discipline, and avoid a lawsuit. The parents have no basis for a lawsuit if there is no discipline to overturn or such light discipline that litigation would be ludicrous. (A parent who files a lawsuit over a reprimand or a "timeout" would probably not encounter a friendly judge.) After all, if a school administrator disciplines a student only to have the discipline overturned in a court of law, the negative impact on school discipline and order could be worse than refraining from a suspension or expulsion in the first place. Educators should always consider deferring to the parents for off-campus mischief that insults, degrades, or defames teachers and administrators.

3. Defer to parental authority before imposing discipline. School administrators would be wise to adopt a presumption that parents have the first option when it comes to imposing discipline for off-campus activity, even off-campus cyber-mischief that ridicules teachers and administrators. When administrators or teachers view web sites that make fun of them, or even threaten them, it is human nature to want to retaliate with discipline. However, retaliation is not always available to school administrators under the law. It is always available to parents.

4. Remember that most providers have service agreements that can work to your advantage. Inappropriate web pages placed on sites such as "MySpace.com"[16] and the popular video site "You Tube" [17] usually violate the terms of service of those sites, and a phone call or letter is usually sufficient to have the offending site taken down.[18] In addition, providers of cell phone service commonly require their subscribers to agree to an "acceptable use policy" and can terminate an account if the policy is violated.[19] Educators are within their rights to report violations of these agreements.

5. Understand the distinction between school jurisdiction and civil and criminal penalties. There are other remedies that address cyber-mischief besides imposing discipline under a student code of conduct. Even though the school might not have legal jurisdiction to discipline a student for cyber-mischief, the court system might. Internet threats can amount to a criminal violation.[20] While it might seem counter-intuitive, there are situations where students who post online threats can be prosecuted, even though there might not be a basis for school discipline because the behavior occurred off-campus. Furthermore, there have been several cases recently in which a teacher has filed suit against a student and parents over the content of a web site. One example is from the *J.S.* v *Bethlehem Area School District* case, the one in which the teacher had to take a leave of absence. The teacher sued the student and his parents and was awarded half a million dollars in damages.[21] Finally, if the misbehavior resulted from student use of a home computer, the parents might face liability under a statute that imputes liability to parents for the misconduct of their children.[22]

6. Use the episode as a teaching example. Schools should develop a curriculum that instructs students in the appropriate use of the Internet.[23] It should include lessons on avoiding Internet predators, refraining from engaging in a dialogue with cyber-bullies, saving copies of hateful messages and web pages, and engaging in appropriate conduct under the concept of "netiquette." Students also need to be taught they and their parents can be sued, like Justin Swidler, the "J. S." from Bethlehem, Pennsylvania. An offensive web page uploaded by a student can be used as a teaching example of the kind of Internet behavior that is unacceptable and inappropriate. Students whose websites are used as examples of inappropriate Internet behavior might be shamed into taking down the site – even if their names aren't mentioned. The other students will know who they are. Never overlook the possibility of using students themselves as agents of change.

7. Emphasize "netiquette" and appropriate Internet behavior. Some students don't realize the impact of their misconduct, or the potential consequences. Many parents are not as proficient in the use of the Internet as their children and simply don't know what to tell them, or what to watch out for.[24] Educators cannot allow themselves to be similarly unenlightened. Most children want to do the right thing. All too often, they simply don't know how. If their parents can't tell them, the school can. One way to avoid misbehavior is to teach proper behavior. Students, like the rest of us, don't know what they don't know.

The law lags behind technology, which is why educators feel helpless and frustrated when it comes to dealing with cyber-bullying, cyber-threats, and other cyber-mischief on the part of students. But educators need to remember that they have strategies at their disposal that can correct and discourage misbehavior in cyber-space. First of all, they can act as educators, use Internet misbehavior as teaching examples, and develop a curriculum that helps students understand proper Internet behavior.

More importantly, educators need to respect the role of parents and defer to parental authority when off-campus misbehavior resonates on campus, especially when the resonance does not satisfy the "substantial disruption" test. When educators are not sure whether the misbehavior rises to the level of substantial disruption, they should consider alternatives to traditional discipline and changes of placement.

When faced with off-campus cyber-mischief and the legal issues that arise from it, school administrators are wise to contact their school's or school district's legal counsel and ask, "What are we going to do about this?" That can help them avoid lawsuits and liability for themselves and the taxpayers of the district. However, they must remember another question that they should ask, one that is likely to be more effective.

That is when they look the student's parents in the eyes and ask, "What are *you* going to do about this?"

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While the author of this article is a member of the State Bar of Arizona, this document is not, and should not be regarded as, legal advice. The objective is to help educators make informed decisions before imposing discipline for cyber-mischief. The comments herein are not intended to apply to any pending situation. School teachers and administrators should consult their local counsel for advice on a particular situation they are facing.

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[1] *Klein* v. *Smith*, Civil No. 86-0177-P, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE, 635 F. Supp. 1440; 1986 U.S. Dist. LEXIS 24551, June 5, 1986

[2] See, for example, *Tinker* v. *Des Moines Independent Community School Dist., No. 21*, SUPREME COURT OF THE UNITED STATES, 393 U.S. 503; 89 S. Ct. 733; 21 L. Ed. 2d 731; 1969 U.S. LEXIS 2443; 49 Ohio Op. 2d 222, November 12, 1968, at , 740 L. Ed. 2d.

[3] Nancy E. Willard, *CyberBullying and Cyberthreats,* 2007, Research Press., at page 17.

[4] Willard, page 23.

[5] These terms are defined in Willard, at pages 5 – 11.

[6] Klump v. Nazareth Area School District, 425 F. Supp. 2d 622, (E.D. Pa., 2006), at 633

[7] Id.

[8] New Jersey v. T.L.O. 469 U.S. 325 (1985), at 326.

[9] http://www.internetworldstats.com/stats.htm.

[10] Student Gets $90,000 Settlement With School District. Student Press Law Center at http://www.splc.org/newsflash.asp?id=1137&year=.

[11] *Elrod* v. *Burns*, 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976).

[12] *J.S. by & ex rel. H.S*. v. *Bethlehem Area Sch. Dist., No. 179* CD 2001 , COMMONWEALTH COURT OF PENNSYLVANIA , 794 A.2d 936; 2002 Pa. Commw. LEXIS 83, November 5, 2001, Argued, February 15, 2002, Decided, February 15, 2002, Filed, Reargument denied April 11, 2002. Appeal denied by J. S. by & Through H.S. v. Bethlehem Area Sch. Dist., 572 Pa. 760, 818 A.2d 506, 2003 Pa. LEXIS 274 (2003).

[13] *Layshock* v. *Hermitage Sch. Dist*., 2:06-cv-116 , UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA , 2006 U.S. Dist. LEXIS 21080, April 7, 2006, Decided, Reconsideration denied by, Motion denied by Layshock v. Hermitage Sch. Dist., 2006 U.S. Dist. LEXIS 20354 (W.D. Pa., Apr. 13, 2006).

[14] 2007 U.S. Dist. LEXIS 49709, decided July 10, 2007.

[15] HB1072, State of Arkansas, 86th General Assembly, Recodified as Act 115. http://www.arkleg.state.ar.us/ftproot/acts/2007/public/act115.pdf.

[16] http://myspace.com/.

[17] http://www.youtube.com/.

[18] See, for example, the MySpace.com Terms of Use Agreement at http://www.myspace.com/Modules/Common/Pages/TermsConditions.aspx. The “You Tube” Terms of Service Agreement is at http://www.utubevideoclip.com/tos.

[19] See, for example, the Verizon Internet Access Service Terms Of Service and Acceptable Use Policy at http://www.verizon.net/policies/vzcom/tos_popup.asp.

[20] For example, see *Asst. principal sues students over MySpace page*, in Pantagraph.com, at http://www.pantagraph.com/articles/2006/09/23/news/doc4514271434e4b260586253.txt. The article notes that “One of the students also is facing criminal felony charges.”

[21] *Libel Lessons: What do students learn about free speech from teachers who sue them for defamation?* Student Press Law Center, Winter 2000-01 - Libel & Privacy Vol. XXII, No. 1 - Page 16 http://www.splc.org/report_detail.asp?id=615&edition=17.

[22] E.g., Arizona Revised Statutes, § 12-661.

[23] A good outline for teacher training curriculum is at *Cyber-Safe Kids, Cyber-Savvy Teens, Cyber-Secure Schools,* Nancy Willard, M.S., J.D., Center for Safe and Responsible Use of the Internet *Presentation Notes* available at: http://csriu.org/onlinedocs/cskcstschools.pdf.

[24] For a useful primer for parents and children, see Nancy E. Willard, *Cyber-Safe Kids, Cyber-Savvy Teens,* 2007, John Wiley & Sons, Inc. Also, Willard, *CyberBullying and Cyberthreats,* Appendix K, at page 265 (“Parent Guide to Cyberbullying and Cyberthreats”), available online at http://cyberbully.org/docs/cbctparents.pdf.